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PRESENT DAY LABOR LITIGATION

After classification of part of the field of labor litigation,[1] it is well to pause at this point and to analyze in more detail the manner in which basic principles have been applied. In the original premise of this series of comments it was asserted that most cases of labor disputes involve the determination of two rights; (1) the right that no one shall interfere with contractual relations; (2) the right to a free flow of labor and goods. The first right will form the theme for later discussions. It is the second right which is now to be examined more closely in relation to the various cases thus far cited.

That this right to a free flow of labor and goods is not an absolute right has been previously illustrated in some detail. It is simply the statement of a general rule, and like most general rules it is subject to

[1] See COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 404.

a number of limitations and qualifications.[2] For example: while the employee C (non-union) is entitled to a free flow of labor and goods (i. e. has a right that his employment by B should not be interfered with by third persons), yet the A (union) employees of B may strike against B and compel the discharge of C.[3] The effect of such a doctrine is to justify interference with the free flow of labor and goods, such interference being permitted if the court finds that it has an approved object. It is now to be determined whether these rules have been logically and properly applied in the various situations that have arisen in labor litigations.

There is a tendency to distinguish between strikes and boycotts in applying the rules now considered.[4] Is there any fundamental difference? Previously in this discussion a boycott has been treated as an incident to a strike; but it is believed that an analysis of the actual situation will show that a strike is merely one form of a boycott. A boycott has been defined as "a combining to withold or prevent dealings or social intercourse with a tradesman, employer, etc.; social and business interdiction for the purpose of coercion."[5] It is thus seen that as soon as labor or patronage is withheld, a boycott exists. And it becomes at once apparent that the boycott represents the general field, while a strike is but one part of it. It may be that different rules are necessary and that a strike should be treated differently from other forms of boycott, but it is well to bear in mind their fundamental similarity.[6] Essen-

[2] "The right to the free flow of labor is not an absolute right; it is limited by the right of employees to combine for purposes which in the eye of the law justify interference with the plaintiffs' right to a free flow of labor." *Haverhill Strand Theatre v. Gillen* (1918) 229 Mass. 413, 118 N. E. 671.

[3] *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389.

[4] It is a matter of general information that "secondary boycotts" are illegal even though the meaning of that expression is somewhat vague and uncertain. It is probably safe to assert that many of the people who use it fail to inquire as to whether there may be a "secondary strike" in like manner, and whether the two have any fundamental points in common. This has doubtless been responsible for a great deal of the confusion now existing in law as to labor litigation, and particularly so as to those matters in which the legislatures have taken action.

[5] Webster's Dictionary. The word "boycott," naturally, has had various judicial interpretations, but in general the courts have followed the above definition, except that there is a tendency to restrict it to mean a withholding of business intercourse alone, rather than a withholding of labor.

[6] The reason why a boycott is generally treated as an incident to a strike seems to be due to historical reasons rather than to a logical classification. It will be remembered that a condition involving a strike was first reported in the early part of the eighteenth century. A boycott, on the other hand, was of much later origin, the first American case being that of *State v. Glidden* (1887) 55 Conn. 46, 8 Atl. 890 [see *Consolidated Steel and Wire Co. v. Murray* (1897, C. C. N. D. Ohio) 80 Fed. 811], in which the court explained the situation which gave rise to the term. Consequently it was but natural to consider a boycott as one means of making a strike more effective. There was first a cessation of work and later this was augmented by a cessation of business relations of all kinds,

tially there can be no difference, for in any case it is a passive remedy—it is simply a refusal to do that which those who are striking or boycotting are not under a legal duty to do, namely, work or trade.

With reference to the simplest form of strike or other boycott the decisions are well in accord. It is now generally accepted that a primary strike or boycott is legal.[7] Here there are but two parties involved. To hold such action illegal would be to hold that it is unlawful for several to do that which it is lawful for each to do individually.[8] Does this situation violate the right to a free flow of labor and goods? It is to be observed that A is not obstructing labor or goods coming to B from someone else. A is simply withholding his own labor or purchases. A has the power to offer his labor, his money, or his goods to B; and B has merely the beneficial liability that such an offer will be made. When it is said that B has a right to a free flow of labor and goods, it is meant that he has rights *in rem* that a third person shall not impair the value of his beneficial liability by inducing A not to exercise his power to make and accept offers—that is, not to deal with B. B, however, has no rights as against A that A shall continue to deal with him. So at best, the only complaint that B can make is that A acted "maliciously," a fact which is not only difficult to prove and of infrequent occurrence, but which indeed is not today generally recognized as a tort.

When, however, we leave the realm of a primary strike or boycott, the courts differ widely in their decisions. Thus, to use again our illustration, the A employees strike against their employer B to compel him to discharge C, a non-union fellow employee. Or another situation is that in which A refuses to deal with B (tradesman) unless B discharges C, a non-union employee.[9] We now have the presence of a third person to further complicate matters. In these cases, as in the case of the primary strike or boycott, we must determine the extent of the application of the doctrine of the right to a free flow of labor and goods. As between A and B it still remains a primary strike or boycott, for, as discussed before, B, as against A, never had the right to A's labor or trade. And since A always seeks to compel B to do or refrain from doing something, in principle it is immaterial, so far as A and B are concerned, that it should involve, as in this case, the discharge

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both by the employees themselves and also by their sympathizers. What could be more natural than to consider a strike as the primary factor? The average person today probably makes this same distinction.

[7] Thus the A employees may strike against their employer B for increased pay, shorter hours, etc., or they may refuse to deal with a tradesman B because his scale of prices is too high. *Willcutt & Sons Co. v. Driscoll* (1907) 200 Mass. 110, 85 N. E. 897.

[8] See (1920) 29 YALE LAW JOURNAL, 809.

[9] It seems as though this might logically be called a secondary strike or boycott, but those terms according to accepted usage have a somewhat different meaning, as will be shown later.

of C. A may demand that B refuse to buy from D, or that he discharge C, or put into effect an eight hour day, etc., and unless A resorts to improper means such as force or fraud, B practically never has a cause of action, for in all such cases it amounts to only one thing—a strike or threat to strike unless B forbears to exercise some privilege, and it is immaterial as between the two, just what that privilege may be. As to C, however, we have a different situation. There is, in the case of C, an actual obstruction of the free flow of C's labor, by a third person (A); in other words an interference with C's prospect of continued employment by B. B wishes to continue C in his employment, but is compelled to discharge him because of economic pressure brought to bear on him by A. As between A and C this seems to be prima facie an unwarranted interference with C's rights, even though A uses means which are often legal (i. e. a strike). Thus we have the general rule that an interference with the right to a free flow of labor or goods by a third party is prima facie tortious, but may be excused if for a justifiable object.[10] The manner of deciding as to whether or not A has a justifiable object and is thus excepted from the general rule of liability, and a classification of these excepted cases will be found in the first comment in this series.[11]

A third situation is that in which A, striking against B, induces D, an outsider, by means of labor trouble or loss of trade, or threats thereof, to refuse to deal with B. This is what is generally called a "secondary boycott."[12] The cases that arise out of a state of facts of

[10] It is submitted that the right to a free flow of labor and goods is but one of the incidents included in the legal interest of one who conducts a lawful business. Many courts hold that any interference with the business of another, unless justified, is a violation of a property right. *King v. Weiss & Lesh Mfg. Co.* (1920, C. C. A. 6th) 266 Fed. 257. Consequently the motive becomes the important factor in the class of disputes. *Tuttle v. Buck* (1909) 107 Minn. 145, 119 N. W. 946. Possibly these instances indicate that our law is tending towards the rule that in general any wilful interference with another, that causes harm to that other, will amount to an actionable tort.

It is to be remembered, however, that even though this doctrine of justification in labor litigation may at first thought seem to support the theory that an act ordinarily privileged is actionable if it is done with a wrong motive and causes harm, still that is not the situation as yet. Strikes and boycotts were originally, and still are, tortious per se, certainly as against third persons. Consequently these cases can merely hold that certain acts, heretofore illegal, are now to be declared legal if the motive is justified. This does not make strikes or boycotts legal per se, and so it would be erroneous to state that it is the exercise of a privilege which becomes a tort only if done with a bad motive.

[11] COMMENTS (1921) 30 YALE LAW JOURNAL, 280.

[12] In *Duplex Printing Co. v. Deering* (1921) 41 Sup. Ct. 172, a secondary boycott is defined as "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

this kind, usually have as their object an injunction against A to restrain him from bringing pressure to bear on B in this manner, or else the collection of damages for harm caused to B by such pressure. It is for this reason that this situation is classified as a "means"; for it is not the original strike (A against B) against which relief is sought, but the indirect means used by the parties to the strike to promote their purposes—the dragging in of outsiders by A as a means of coercing B.[13] If the E employees of D were to strike without any compulsion by A, then there would simply be two separate strikes, each to undergo the test of justification. But when the situation is such that A is in a position to call out E, the courts say at once that it is a secondary boycott and illegal for A to do so. Here it will be noticed that A is interfering with B's right to a free flow of labor and goods from D. A cannot be enjoined from withholding his own labor, but as soon as he compels D to withhold commerce from B, A is in the position of an interfering third person, and his action requires justification. It is not the purpose of the present discussion to suggest that this is or is not a justifiable object; it is sufficient to point out that practically all the courts declare it to be illegal. But it is interesting to note that there are at least three jurisdictions that have lately sanctioned a secondary boycott.[14]

A complicating feature in present day labor litigation is the fact that the unions are gradually combining into confederated groups.[15] Manifestly the power of such a group is enormous. Thus the leaders in control of such federation may declare several distinct strikes in order to coerce one particular employer. The general tendency appears to treat each local union, party to a strike, as a separate unit, and to hold that the interest common to the members of the federation as a whole is not sufficient to excuse acts not otherwise justifiable. Where a federation attempts to put into effect a general boycott, it will usually be restrained.[16]

When the situation is thus analyzed we find that strikes or boycotts can be grouped under three heads: (1) A strikes against B for better working conditions;[17] (2) A strikes against B to compel him to cease

[13] COMMENTS (1921) 30 YALE LAW JOURNAL, 404. This is the situation that seems to be involved in *Duplex Printing Co. v. Deering, supra*. The dissenting opinion in that case seems to take the view that there was no coercion as between A and E.

[14] *Pierce v. Stablemen's Union* (1909) 156 Calif. 70, 103 Pac. 324; *Empire Theatre Co. v. Cloke* (1917) 53 Mont. 183, 163 Pac. 107; cf. *Meier v. Speer* (1910) 96 Ark. 618, 132 S. W. 988.

[15] See F. H. Cooke, *Solidarity of Interest as Basis of Legality of Boycotting* (1902) 11 YALE LAW JOURNAL, 153.

[16] In a controversy of this kind both strikes and boycotts of trade are employed. A federation may boycott B, and in so doing use a strike as well as other means. *Gompers v. Bucks Stove & Range Co.* (1911) 221 U. S. 418, 31 Sup. Ct. 492.

[17] A "sympathetic" strike is a peculiar situation and can perhaps be classified best under this head. An illustration of such a strike is where there is a strike

employing C, or to cease dealing with C; and (3) A, striking against B, compels D, by threats of strike or boycott, to cease dealing with B. Strikes falling within the first group are generally held to be lawful; those in the second group require justification; and those in the third group constitute illegal means and are generally held to be unlawful.

The recent decisions show important tendencies in the last two classes. The courts are gradually extending the scope of a justifiable object. Indeed there is no certain criterion as to what constitutes justifiable trade competition and where the logical stopping point should be.[18] This must necessarily vary according to the mores of the time. It may be that in the past few years, due to peculiar industrial conditions, the pendulum has been swinging in the direction of the labor unions and is now about to swing back. Yet there are some who think it has not swung far enough. Surely we can expect the decisions to become more nearly uniform and can hope that the question of what constitutes a justifiable object, will be rendered more certain. Whatever conduct will be permitted, will of course operate to limit the doctrine of the right to a free flow of labor and goods.[19]

MUTUAL ASSENT AS AFFECTED BY UNILATERAL MISTAKE

The interesting, though by no means new, question as to whether a contract comes into existence when an offer made by mistake is in terms accepted, was raised in the recent case of *Independent Trading Co. v.*

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on the B railroad and then the employees of the D railroad go out on strike, merely to bring moral pressure to bear on B. Naturally, if we apply the tests suggested in this series of comments, there is no cause of action against such strikers, unless it appear that the employees of D were by reason of affiliation or otherwise acting under compulsion rather than as free agents in declaring their strike. A situation in which E strikes against D to compel D not to trade with B (whose employees A are on strike) has sometimes been called a sympathetic strike. See Darling, *Recent American Decisions and English Legislation Affecting Labor Unions* (1908) 42 AM. L. REV. 200. But such a situation falls within class 2.

[18] This is simply a question of degree. Mr. Justice Holmes has stated that most differences are only of degree, when nicely analyzed. *Rideout v. Knox* (1889) 148 Mass. 268, 372, 19 N. E. 390, 392.

[19] It is possible, too, that the courts will extend a remedy to certain groups, which at the present time have no remedy. Thus A may strike against his employer B to have C discharged. Let us suppose that this occurs in a jurisdiction in which C is given a cause of action against A. *Smith v. Bowen* (1919) 232 Mass. 106, 121 N. E. 814. Then if A causes interference with C, C may sue A. But suppose that B chooses to retain C, why should he not have an action against A? Obviously A is committing a tort against C and it seems that in logic B should be given a remedy in case he suffers harm by resisting A's demands. Take the example of a secondary boycott: A compels D to cease dealing with B. B can restrain such action by A. But suppose D refuses to stop dealing with B, and sues A for interfering? *Karges Furniture Co. v. Amalgamated Union* (1905) 165 Ind. 421, 75 N. E. 877. It is true that few cases come up in this manner, but this may be due to the fact that it is generally recognized that the courts would not grant relief.

Fougera & Co. In that case the plaintiff, over the telephone, asked the defendant for a quotation on 100 pounds of "potassium guaiacol "sulphonate, C. P. white," which had been quoted to him on the same day by several dealers at $30 a pound. Defendant's manager asked for ten minutes' time and said he would call back. This he did; he told the plaintiff the price was $10.50 per pound. Plaintiff told defendant that he would take 100 pounds, to which defendant's manager replied: "Send around your contracts." A writing was sent, on which defendant's agent wrote as follows: "Accepted, E. Fougera & Co., by L. Jacobs."

The article designated in plaintiff's request for quotation was in the form of perfectly white crystals and was worth $30 per pound, but defendant's agent in accepting thought he was asked for the price of, and meant to give the price of, the calcine or powder form of the article, which contained exactly the same chemical ingredients and was worth about $10 per pound. The article designated by the plaintiff was known to the defendant's agent as "thiocol." Defendant offered to furnish the calcine form of the article, which plaintiff refused to accept; and the defendant refused to supply the higher priced article. In an action for damages for refusal to supply the latter article, it was held that the plaintiff should recover, on the ground that there was no evidence that there was any mutual mistake of the parties. Greenbaum and Smith, JJ., dissented on the ground that plaintiff knew, or ought to have known, that the defendant did not intend to offer to sell the article worth $30 per pound.

The making of an offer creates a legal power in the offeree.[2] Whether certain acts operate as an offer and create such a power depends upon the reasonable interpretation of these acts. It does not depend upon the secret intent of the person doing the acts. If they have reasonably created the impression that he is willing to assume a particular legal duty, the offeree has a power to create such a duty by acceptance. This is the law because it accords with the prevailing notions of justice and public policy, the mores of society. Not only is the existence of a power of acceptance thus determined; the content and limitations of the power are determined by the same standard.[3] At present society simply asks: Did the acts of the offeror lead the offeree reasonably to believe that he could impose (or what is the same thing, that the offeror was willing to assume) the particular duty in question, at the time of the acceptance? If such acts did reasonably lead the offeree so to believe, society, because it believes that justice

[1] (1920) 192 App. Div. 686, 183 N. Y. Supp. 431.

[2] Corbin, *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169, 171, 181; 1 Williston, Contracts (1920) 31.

[3] See Corbin, *op. cit.*, at p. 183: "The rules of contracts, like all other rules of law, are based upon mere matters of policy, or belief as to policy." *American Water Softener Co. v. United States* (1915) 50 Ct. Cl. 209; *Mansfield v. Hodgdon* (1888) 147 Mass. 304, 17 N. E. 544 (specific performance decreed).

requires it, decrees the existence of the power.[4] In the principal case an offer was in fact made and there was a power, and the question was as to its character and extent. The offeree could impose a duty to deliver some article; but what article? Manifestly, this is a question of fact;[5] and it is to be answered by applying the standard of the reasonably prudent man placed under the same, or similar, circumstances. The article that such a man would have believed he was being offered is the article that the defendant is under a duty to deliver.[6]

Tested by these considerations, what should have been the result in the principal case?

The defendant's language, literally construed, was an offer to sell 100 pounds of "potassium guaiacol sulphonate, C. P. white" at $10.50 per pound. If a reasonable man, situated as plaintiff was, would have believed that the defendant was willing to assume a duty to deliver the chemical worth $30 a pound for the price of $10.50 per pound, then the plaintiff had a power to impose upon the defendant a duty to deliver that chemical at that price; otherwise not. A jury should have been required to ascertain whether a reasonable basis for such belief existed.[7]

It will be observed that this test does not make the offer dependent upon the secret intent of the offeror. The law relating to offer in contract looks at the acts of the offeror and considers the impression which these acts should reasonably make upon the mind of the offeree under the existent circumstances. The offeror's words will not, of course, be literally or technically construed, unless such literal or technical construction would be the reasonable one under the circumstances.[8] The circumstances include the knowledge which the offeree has, or ought to have.[9]

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[4] *Carnegie Steel Co. v. Connelly* (1916, Sup. Ct.) 89 N. J. L. 1, 97 Atl. 774; *Embry v. Hargadine Dry Goods Co.* (1907) 127 Mo. App. 383, 105 S. W. 777; *Phillips v. Gallant* (1875) 62 N. Y. 256, 264.

[5] *Parker v. South Eastern Ry.* (1875) L. R. 2 C. P. 416, 423, 426.

[6] Anson, *Contract* (Corbin's ed. 1919) 32, note. *Parker v. South Eastern Ry. supra,* at pp. 423, 425; *Cargill Commission Co. v. Mowery* (1916) 99 Kan. 389, 161 Pac. 634; *Taplin & Rowell v. Clark* (1915) 89 Vt. 226, 95 Atl. 491; *Rupley v. Daggett* (1874) 74 Ill. 351; *Tyra v. Cheney* (1915) 129 Minn. 428, 152 N. W. 825; *Grant Marble Co. v. Abbot* (1910) 142 Wis. 279, 124 N. W. 264 (rescission denied); *Coates & Sons v. Buck* (1896) 93 Wis. 128, 67 N. W. 23.

[7] If the jury should find that the plaintiff was not reasonable in believing that the defendant was offering the crystalline form of the chemical, but that the reasonable belief was that the calcine or powdered form was offered, instead of the plaintiff's having a right to delivery of the crystalline form, he would be under a duty to take the powder form. *Parker v. South Eastern Ry., supra* note 5; *Neill v. Midland* (1869, Ch.) 20 L. T. 864, 17 W. R. 871; *Buck v. Equitable Life Assur. Soc.* (1917) 96 Wash. 683, 165 Pac. 878.

[8] Corbin, *op. cit.* note 2, at p. 177.

[9] Anson, *Contract* (Corbin's ed. 1919) 213, note 2. *Goddard v. Jeffreys* (1882, Ch.) 45 L. T. 574, 30 W. R. 270; *Neill v. Midland Ry., supra* note 7; *Buck v. Equitable Life Assur. Soc., supra* note 7.

It has often been recognized by courts of equity in similar cases, where there were otherwise the usual grounds to decree specific performance, that it was very hard and unconscionable to insist on the performance of a contract, even though the words of the parties taken out of their setting, namely, all the surrounding circumstances, indicated a meeting of the minds. In such cases, equity has often remitted the parties to such remedies as the law would give, on the ground that specifically enforcing the bargain would be harsh.

Such a case was *Webster v. Cecil.*[10] Webster first offered Cecil £2,000 for certain parcels of land, the offer being refused. Cecil later wrote making an offer to sell the land for £1,100, which Webster accepted by return mail. Cecil meant to offer the land for £2,100, but made an error in adding the valuations he had put on the parcels separately. This error he attempted to correct as soon as he discovered it. Specific performance was refused on the ground that the mistake had been clearly proved; and the plaintiff was remitted to such action as he might be advised to bring at law.[11]

Some courts, however, have even gone so far as to grant equitable relief where, according to accepted theories, there was a valid contract. Thus, in *St. Nicholas Church v. Kropp,*[12] where a builder had sub-

[10] (1861,Ch.) 30 Beav. 62.

[11] It seems that a more substantial basis for refusing the relief asked in this case would have been that there was no contract to be enforced. On this ground likewise damages would not be recoverable at law. It is interesting to speculate as to why the equity courts, until recent times, rather consistently fail to avail themselves of this apparently more solid ground upon which to deny relief in such cases. It may be that, because the law relating to offer and acceptance is of comparatively recent development, this ground for denying relief, if "more solid," was less obvious to courts of equity seventy-five years ago than now. Or it may be that in the earlier cases equity was but tacitly acknowledging that its adjudication that no contract existed would not make that fact *res adjudicata* so as to prevent an action at law. In either event the later cases have somewhat blindly followed the practice in the earlier. For similar cases denying equitable relief and remitting to legal remedies, see *Chute v. Quincy* (1892) 156 Mass. 189, 30 N. E. 550; *Mansfield v. Sherman* (1889) 81 Me. 365, 17 Atl. 300; *Burkhalter v. Jones* (1884) 32 Kan. 5, 3 Pac. 559. In the latter case the court, at page 13, used this language: "In strict law, and by the words of the letters of the parties, we think the parties made a contract; but we also think that in fact and in equity the minds of the parties never came together; that they never really agreed to the same thing; and therefore in equity and good conscience, they did not make a contract, or at least they did not make such a contract as equity should adjudge to be specifically enforced." The writer does not maintain that specific performance should always be decreed in cases similar to *Webster v. Cecil,* if there is a contract for the breach of which a court of law would give damages. But it is believed that, in this class of cases, the number of instances where the plaintiff would recover damages, when equity had refused him specific performance, would be surprisingly small.

[12] (1916) 135 Minn. 115, 160 N. W. 500. See also *Board of School Com'rs v. Bender* (1904) 36 Ind. App. 164, 72 N. E. 154; *contra, Steinmeyer v. Schroeppel* (1907) 226 Ill. 9, 80 N. E. 564. Specific performance, however, is very often decreed where there is a unilateral mistake unknown to the other party; *Goddard*

mitted a bid for the erection of a church, which had been accepted, it was held that the fact, unknown to the church committee, that the builder omitted to include in his estimate the structural steel for the building, justified the court in releasing the bidder where the other party had not materially changed its position, the bidder, as the court said, being free from negligence resulting in the mistake.

One of the leading law cases on this subject is *Smith v. Hughes.*[13] The plaintiff applied to defendant, a race horse trainer, to know if he wanted to buy oats and, receiving a reply that he was always ready to buy good oats, exhibited a sample and stated that he had 40 or 50 quarters of the same oats to sell at 35s per quarter. Defendant took the sample and wrote the next day that he would take the whole quantity at 34s per quarter. Plaintiff sent some of the oats, which were refused because they were not old oats. The parties had not in terms mentioned old oats; but the price offered was high for new oats, and more than a prudent man would have given. Plaintiff knew defendant was a race horse trainer, but was not aware of the fact that such trainers never used new oats if old could be had. In an action for damages for refusal to take the oats, it was held error to instruct the jury that the plaintiff could not recover if plaintiff believed that the defendant "believed or was under the impression that he was "contracting for the purchase of old oats."

Justice Cockburn based his opinion on the ground that "the passive "acquiescence of the seller in the self-deception of the buyer will not "entitle the latter to avoid the contract." Justice Blackburn said that "there is no legal obligation on the vendor to inform the purchaser "that he is under a mistake, not induced by the act of the vendor;" and that the direction did not call attention to "the distinction between "agreeing to take the oats under the belief that they were old, and "agreeing to take the oats under a belief that the plaintiff contracted "that they were old." Only in the latter case, he thought, should the defendant recover. Hannen, J., said that the defendant should not have judgment unless the jury find, "not merely that the plaintiff believed "the defendant to believe that he was buying old oats, but that he "believed the defendant to believe that he, the plaintiff, was contracting "to sell old oats."

It seems to be assumed by all the judges that actual belief or knowledge of the parties is controlling. It would seem more nearly correct to say that the plaintiff's offer creates in the offeree a power to impose such a duty on the offeror as a reasonably prudent man would believe the offeror to have offered to assume.[14] If such a man would have

v. Jeffreys, supra note 9; *Phillip v. Gallant, supra* note 4; *Mansfield v. Hodgdon, supra* note 3.

[13] (1871) L. R. 6 Q. B. 597.

[14] See note 6, supra. In *Tyra v. Cheney,* where the acceptor had not induced the mistake, Holt, J., said: "One cannot snap up an offer or bid knowing that

understood reasonably from the very high price put on the oats, that old oats were being offered, a power to create a duty to deliver such oats should be held to have existed. The same conclusion should follow from the mere offer to sell oats, if it is so well known that race horse trainers use only old oats that a reasonably prudent man would think that only old oats would be offered. What such a man would understand determines what power is created, and the question is one of fact.

In this case of the oats the defendant made a counter-offer. The power he thus created is that which the jury finds would have been understood by a reasonably prudent man under the circumstances, among which are the very important facts that the oats were offered to one who never buys new oats if old can be had,[15] and at a price which no prudent man would pay for new oats. The judges all seem to assume that, so far as the existence of the defendant's belief that he was originally offered old oats is concerned, the plaintiff has been passive, i. e., has done nothing to induce that belief. It seems clear that this is incorrect in view of the facts above referred to, namely, putting on of a price not reasonable for new oats and offering to sell to one who generally is not in the market for such oats.

It seems questionable whether it is useful to attempt to apply the distinction suggested between a belief formed where the offerer is said to be passive and one formed where the offeror is said to have induced it.[16]

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it was made in mistake." This simply means that the offeree does not acquire that power which the offeror's language purports to confer on him, because he has not sufficient reason to believe that the offeror is willing to assume the duty indicated by his words. But see *Southbridge Roofing Co. v. Providence Cornice Co.* (1916) 39 R. I. 35, 97 Atl. 210.

[15] Whether the offeree, or a reasonably prudent man, would think that the offer is to purchase only old oats when a sample has been shown and priced to him with a view to sale, will be dependent, assuming of course no actual knowledge in the offeree, upon the generality of knowledge that race horse trainers want only old oats if they can get them, and upon the scarcity in the market of old oats. If old oats are known to be very scarce, the race horse trainer may not, from the mere fact of offer, reasonably believe that the price named is for old oats.

In *Greene v. Bateman* (1846, C. C. D. R. I.) Fed. Cas. No. 5762, Woodbury, C. J., said: "If one agreed to $3.25 per bunch, and the other to $3.25 per thousand, only half as high a price, there was in truth no contract, as it takes two, we all know, both in fact and in law, to make a contract. Had nothing been said as to bunches or thousands, and the sale was of shingles at $3.25, it might be presumed that the parties meant per thousand, as it was shown to be usual to sell by the thousand at Providence; and it surely would be so presumed if a knowledge of this usage had been brought home to the plaintiff, or if he as well as the defendant had resided at Providence, and thus been likely to know and conform to the usage."

[16] Such cases would be extremely rare, if existent at all, for the reason that a power, in the law of contract, cannot be created, an offer cannot be made, by merely remaining passive. There must be human action.

The question always is: What belief is reasonably induced, or ought to be induced.[17]

The same test applies, after we have determined what power in the offeree has been created, as to whether *that* power has been exercised. Here, as in the case of the offer, the secret intent of the offeree does not control, because, as we have seen, contracts are not made by, nor are they consequent upon, actual intents and consents. If, under all the existent circumstances, a reasonably prudent man would believe that in acting the offeree was exercising the power created by the offer, a contract results. Here again the question is one of fact.[18]

It is admitted that some of the older sales cases applying the doctrine of *caveat emptor* would not square with the view here maintained. The fact, however, that many of those decisions shock our sense of justice is one reason why we should cease to apply that doctrine in such cases. Where the application of that doctrine does not seem harsh, the above views as to the controlling considerations, views applicable to contract relations in general, will, it is believed, explain the decisions.

H. W. A.

TAXATION OF FOREIGN CORPORATIONS

In the recent case of *Underwood Typewriter Co. v. Chamberlain* (1920, U. S.) 41 Sup. Ct. 45, the Supreme Court of the United States dealt with a new application of the principles governing state taxation of foreign corporations. A Connecticut statute levied a tax of two per cent on that proportion of the "net income" of a foreign corporation which the fair cash value of the tangible real and personal property in the state bore to the fair cash value of all the corporate property. A Delaware corporation, with its principal manufacturing plant in Connecticut, contested the tax as unconstitutional and showed that by this method of apportionment the tax was levied upon forty-seven per cent of its net income, which was much more than the actual amount of income derived from "business in Connecticut." The company's net receipts in other states were over $1,000,000 and in Connecticut only about $42,000; while under the method of apportionment fixed by the statute a tax was levied on a sum in excess of $600,000. The

[17] See authorities cited in note 6, *supra*.

[18] In *Johnson Fish Co. v. Hawley* (1912) 150 Wis. 578, 582, 137 N. W. 773, 775, referring to plaintiff's alleged acceptance, which was ambiguous and which had not been treated as an acceptance, the court said: "If it be true that respondent did not mean to convey such an idea; but used language leading Mr. Hawley, in the exercise of ordinary care, to suppose it did, it must bear the burden of its fault. He had a right to act upon the meaning which respondent's words conveyed to him, if such, reasonably, might be the meaning an ordinarily careful person would read out of such language under the same or similar circumstances." See also *Vanleer v. Fain* (1845, Tenn.) 6 Humph. 104; *Kendall v. Boyer* (1909) 144 Iowa, 303, 122 N. W. 941; *Clark v. Maisch* (1920, Wis.) 177 N. W. 11.

Supreme Court, sustaining the decision of the Connecticut supreme court of errors,[1] declared the tax constitutional.

In taxing the property of foreign corporations the state legislatures have often run into conflict with the Commerce Clause and the Fourteenth Amendment of the federal Constitution. The difficulty has been in allocating to the taxing jurisdiction a certain part of the total corporate property or income or in finding some method of determining its "true value" for purposes of taxation. A state may levy a tax upon the intra-state business of a foreign corporation,[2] or it may tax its property situated within the state, but used in interstate commerce.[3] But it is difficult to apply such general principles to specific cases.[4] An excise tax based upon the entire capital stock or gross receipts of a corporation doing business[5] in the state has been held invalid[6] unless there was a limit placed on the total amount of the tax thus levied, although there would seem to be no fundamental reason for the distinction.[7] It is evident from these decisions that some bona fide attempt at apportionment is necessary and that a tax based upon the entire corporate property, capital stock, or earnings will not be sustained.

In fixing a basis of apportioning the corporate stock or income for taxation the states have used various methods. The so-called "unit of value" rule by which a tax was levied upon that proportion of the capital stock which the length of the company's lines in the state bore to the total mileage has been declared constitutional.[8] But the unit rule will not be applied when an unjust apportionment would result.[9]

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[1] (1919) 94 Conn. 47, 108 Atl. 154. The Supreme Court of the United States cited with approval the following remarks of Justice Beach in answer to the argument that the tax was based upon an unfair apportionment. "The Plaintiff's argument . . . carries the burden of showing that 47 per cent of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent of its gross earnings was derived after paying manufacturing costs. Cf. *Amer. Mfg. Co. v. St. Louis* (1918) 250 U. S. 459, 39 Sup. Ct. 522.

[2] *Postal Telegraph-Cable Co. v. Richmond* (1919) 249 U. S. 252, 39 Sup. Ct. 265.

[3] *Postal Telegraph-Cable Co. v. Adams* (1895) 155 U. S. 688, 695, 15 Sup. Ct. 268, 269.

[4] See Beale, *The Situs of Things* (1919) 28 YALE LAW JOURNAL, 525, for a general discussion of this subject and authorities cited.

[5] See *infra* p. 529.

[6] *Western Union Tel. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190; *International Paper Co. v. Mass.* (1918) 246 U. S. 135, 38 Sup. Ct. 292; *Looney v. Crane* (1917) 245 U. S. 178, 38 Sup. Ct. 85; *Galveston Ry. v. Texas* (1908) 210 U. S. 217, 28 Sup. Ct. 638.

[7] *Baltic Mining Co. v. Mass.* (1913) 231 U. S. 68, 34 Sup. Ct. 15. See COMMENTS (1918) 27 YALE LAW JOURNAL, 1074.

[8] *Adams Express Co. v. Ohio State Auditor* (1897) 165 U. S. 194, 17 Sup. Ct. 604; *Southeastern Ry. v. Arkansas* (1914) 235 U. S. 350, 35 Sup. Ct. 99.

[9] *Wallace v. Hines* (1920, U. S.) 40 Sup. Ct. 435. In this case the mileage method gave to the property of the corporation in South Dakota an arbitrarily enhanced

Likewise, where the tax was placed upon the corporate property, such as cars travelling in and out of the state, and such number of all the company's cars was taxed as the mileage in the state bore to the total mileage, the court found that the property was arbitrarily valued too high and held the tax invalid.[10] So with a tax based upon the gross receipts and measured by the proportion that the business done in the state bears to the entire business.[11] But a tax upon gross receipts from business done in the state has been upheld when it was in lieu of all other taxes, thus distinguishing it from the case last cited.[12] Taxes upon the net income of non-residents derived from all property or business carried on within the state have been sustained recently.[13] Thus it appears that state taxation will be sustained when a bona fide attempt to estimate the "true value" or allocate the property has been made and a just result reached. No distinction has been made between a tax based upon capital stock, gross receipts, net income, gross business, or tangible corporate property when properly apportioned. Nor is there ground for distinction between a tax which is in effect an excise tax and a tax upon corporate property, although the court would seem to be more inclined to uphold the latter.[14] Each case stands on its own merits as to justice in the result. The court's decision in the principle case, sustaining the tax on the ground that though most of the income was received outside Connecticut it was received from manufacture in Connecticut, is in harmony with principles previously announced.[15]

A MERE QUANTUM MERUIT FOR ATTORNEYS' FEES.

It may be true, in this country at least, that a lawyer is worthy of his hire, but this does not mean that he is always to get what he thinks

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value. The company had no terminals in that state and its road bed was constructed across plains at much smaller expense than in other states where the nature of the country and the size and number of the cities made railroad building more costly. See *Fargo v. Hart* (1904) 193 U. S. 490, 24 Sup. Ct. 498.

[10] *Union Tank Line v. Wright* (1919) 249 U. S. 275, 39 Sup. Ct. 276. See COMMENTS (1919) 28 YALE LAW JOURNAL, 802.

[11] *Meyer v. Wells Fargo and Co.* (1912) 223 U. S. 298, 32 Sup. Ct. 218.

[12] *U. S. Express Co. v. Minn.* (1912) 223 U. S. 335, 32 Sup. Ct. 211. Likewise taxing gross earnings from car lines operated in the state, in lieu of all other taxes, has been held constitutional. *Cudahy Packing Co. v. Minn.* (1918) 246 U. S. 450, 38 Sup. Ct. 373.

[13] *Travis v. Yale Towne Mfg. Co.* (1920, U. S.) 40 Sup. Ct. 228; *Shaffer v. Carter* (1920, U. S., 40 Sup. Ct. 221; see *Deganay v. Lederer* (1919) 250 U. S. 376, 39 Sup. Ct. 524.

[14] See *U. S. Express Co. v. Minn.* (1912) 223 U. S. 335, 344 ff., 32 Sup. Ct. 211, 214 ff.

[15] For a more complete discussion of this subject with the authorities collected see Powell, *Indirect Encroachment of Federal Authority by the Taxing Powers of the States* (1917-18) 31 HARV. L. REV. 321, 572, 721, 932; (1918-19) 32 *id.* 234, 374, 634, 902.

his hire should be. He may recover in *quantum meruit* the "reasonable value" of his services practically everywhere in the United States,[1] but a series of recent cases has shown that there may nevertheless be obstacles in his way of recovering a definite and agreed fee. If such fee is contingent, it is, according to the Canons of Legal Ethics of the American Bar Association, subject to the supervision of the court, in order that the client may be protected from unjust charges.[2] Except for this, the fee when fairly agreed upon is recoverable by a lawyer who has completed the promised service.[3] If the lawyer is in default, he may by the better rule recover nothing.[4] If, however, he is ready and willing to perform but is wrongfully discharged by his client, a conflict of authority has developed. Probably the majority of cases allow him in such case to recover his agreed fee,[5] but the minority dissent has been reinforced by strong decisions in New York[6] in

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[1] *Newman v. Washington* (1827, Tenn.) Mart. & Y. 79; Costigan, *Cases on* Legal Ethics (1917) 484; *Adams v. Stevens* (1841, N. Y.) 26 Wend. 451. In New Jersey an express promise of a fee is necessary. *Bentley v. Fidelity & Deposit Co.* (1908) 75 N. J. L. 828, 89 Atl. 202, 127 Am. St. Rep. 841, note. See also cases collected 6 C. J. 719; 1 Thornton, *Attorneys at Law* (1914) secs. 414, 487. As to the English rule *contra*, see note 19 *infra*. This was the early rule in Pennsylvania, *Mooney v. Lloyd* (1819, Pa.) 5 S. & R. 412, later overruled in *Foster v. Jack* (1835, Pa.) 4 Watts, 334.

[2] Canon 13. The Canons of Ethics are reprinted in each volume of Am. Bar. Assn. Reports since Vol. 33 (except Vols. 35 and 36), also in Costigan, *op. cit.*, at p. 570. While these canons are not statutes, they are given much weight in such proceedings as those for the disciplining of lawyers: *In re Morrison* (1920, S. D.) 178 N. W. 732; *People v. Berezniak* (1920) 292 Ill. 305, 127 N. E. 36; (1920) 5 MINN. L. REV. 71. Courts have refused to enforce unconscionable contingent fee contracts, but they hesitate to base such action on the size of the fee alone. *Taylor v. Bemiss* (1884) 110 U. S. 42, 3 Sup. Ct. 441; 6 C. J. 741. The Canons of Ethics seem not to have affected the situation. *Ridge v. Healy* (1918, C. C. A. 8th) 251 Fed. 798, 804; *In re D'Adamo's Estate* (1916, Surro.) 94 Misc. 1, 157 N. Y. Supp. 374; *In re Meng* (1919) 227 N. Y. 264, 125 N. E. 500.

[3] See references to cases collected in note 1 *supra*.

[4] Cases collected 6 C. J. 726; Thornton, *op. cit.*, sec. 450; see also *Mills v. Metropolitan St. Ry.* (1920, Mo.) 221 S. W. 1.

[5] *Dorshimer v. Herndon* (1915) 98 Neb. 421, 153 N. W. 496; *Scheinesohn v. Lemonek* (1911) 84 Oh. St. 424, 95 N. E. 913, Ann. Cas. 1912 C, 737, note. See also cases collected L. R. 1917 F, 406; 6 C. J. 734.

[6] *Martin v. Camp* (1916) 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F, 402, note, reversing (1914) 161 App. Div. 610, 146 N. Y. Supp. 1041. See criticism by W. A. Estrich, *Right to Discharge an Attorney* (1918) 25 CASE AND COMMENT, 563; (1916) 30 HARV. L. REV. 183; 2 Williston, *Contracts* (1920) sec. 1029. Cf. (1916) 26 YALE LAW JOURNAL, 153. The decision in the lower court was approved in (1914) 28 HARV. L. REV. 101 and (1914) 14 COL. L. REV. 597. Earlier cases in accord with *Martin v. Camp* are *Louque v. Dejan* (1911) 129 La. 519, 56 So. 427, 38 L. R. A. (N. S.) 389, note; *Polsley v. Anderson* (1874) 7 W. Va. 202; *Western Union Tel. Co. v. Semmes* (1890) 73 Md. 9, 20 Atl. 127; *Parish v. McGowan* (1912) 39 App. D. C. 184 (discharge before substantial compliance). Cf. also *Henry v. Vance* (1901) 111 Ky. 72, 63 S. W. 273. As

1916 and in Minnesota[7] and South Dakota[8] in 1920. Oregon, however, has recently decided with the majority without noting the opposing rule.[9] The theory of what may perhaps be termed the New York rule, in view of the general resort to *Martin v. Camp*[10] as authority, is that since the client has the "right" to discharge the lawyer at any time, the exercise of that "right" is not to be followed by the same duty of paying the agreed fee as though it had not been exercised.

It is proposed to examine this viewpoint, particularly since it has been the subject of rather general criticism.[11] It may be admitted at once that the onus is on those who support this rule to justify it on some compelling reasons of policy, since it is at variance with the ordinary rule of agency or employment.[12] Do such reasons of policy exist?

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the above cases show, this result seems more easily reached where the contract is for a contingent fee, 6 C. J. 725. See *Ramey v. Graves* (1920, Wash.) 191 Pac. 801. In *Ennis v. Beers* (1911) 84 Conn. 610, 80 Atl. 772, only *quantum meruit* was allowed against a minor.

[7] *Lawler v. Dunn* (1920, Minn.) 176 N. W. 989, two judges dissenting; see criticism, (1920) 4 MINN. L. REV. 441, (1920) 20 COL. L. REV. 729.

[8] *Ritz v. Carpenter* (1920, S. D.) 178 N. W. 877. *Ramey v. Graves, supra* note 6, in accord, is rested upon the ground that the contract was for a contingent fee.

[9] *Dolph v. Speckart* (1920, Ore.) 186 Pac. 32. A note on this case in (1920) 20 COL. L. REV. 485 discusses another point. See also *Teiser v. Barlow* (1920, Ore.) 192 Pac. 394, *Allen v. Brooke* (1920, Ga.) 102 S. E. 832, and dictum in accord in *Mills v. Metropolitan St. Ry., supra* note 4, at p. 5.

[10] *Supra* note 6.

[11] See notes 6 and 7 *supra*.

[12] Though an attorney is an officer of the court, as between him and his client the general rules of agent and principal apply. 1 Mechem, *Law of Agency* (2d ed. 1914) sec. 2150. In the ordinary contract of employment, an employee wrongfully discharged recovers his damages based upon the contract price less such damages as he might have reasonably avoided. Williston, *Contracts* (1920) secs. 1028, 1358 ff. That the rule as to minimizing damages does not ordinarily apply to attorneys who have not contracted to give a definite portion of their time, see *Dixon v. Volunteer Bank* (1913) 213 Mass. 345, 100 N. E. 655; 6 C. J. 725. It is submitted that Professor Williston's criticism of *Martin v. Camp, supra* note 6—"It is a fundamental principle of contracts that both parties must be bound by the agreement"—states merely the logical rule to be applied *in the absence of any countervailing policy*. He himself states one exception—voidable promises—which is a much more inclusive class than the example he suggests of minors, and he himself points out that relations between attorney and client are subject to careful scrutiny, with the burden upon the attorney to show the fairness of any dealings with his client. Williston, *op. cit.*, secs. 1029, 1627. Even though he limits this rule to dealings *after* the relation of attorney and client exists, he shows that his "fundamental" rule has some gaps. Moreover, it is suggested that the same factors of more extensive knowledge or means of knowledge on the attorney's part and confidence on the client's part, at least to some extent exist at the *formation* of the relation, so that it, too, should be subject to some scrutiny. The statements in cases like *Elmore v. Johnson* (1892) 143 Ill. 513, 32 N. E. 413, that then the parties deal with each other at arm's length seems too broad. Even from the standpoint of logic alone it would seem that courts have power to control *their own officers*.

On these points the courts in the recent cases might well have been more definite. They speak of an implied or inferred condition of the contract and then rely upon the "right" of discharge, which does suggest the policy involved, but, as the criticisms show, with not enough clearness to convince.[13] Any person has the power "to break his contract," i. e., to change the form of his duty to the plaintiff from one based upon his promise to one based upon the remedial action of the court. Where the courts will order specific performance, this new duty is not essentially different from his original duty, except that it is more serious by reason of costs and damages. As courts will not attempt to enforce specifically contracts of personal service,[14] it would follow that in any such contract a party has power to substitute money damages for performance. What the courts are really interested in here is whether the termination is privileged, i. e., whether no duty to pay damages as for a wrongful discharge will be enforced by the courts.[15]

It is stated by countless authorities as well settled that a client has the "right" to discharge his attorney and to substitute another at any time with or without cause and in spite of any contract. The reason of policy assigned is the necessity inherent in the relationship of absolute confidence of the client in his attorney; when such confidence ends, the relationship should end.[16] But under the majority rule above stated, the courts say that a discharge without cause amounts to a breach of contract, and the damages are measured by the contract price.[17] Hence the discharge of the lawyer, unless for justifiable cause, would not be a defense to an action for the contract price. It is difficult to see what is the practical utility of the "right" of substitu-

[13] See criticism of these cases on this point (1920) 29 YALE LAW JOURNAL, 921. The flamboyant language in *Ritz v. Carpenter, supra* note 8, is subject to the same criticism.

[14] It has been held that there is no room for the application of the rule of *Lumley v. Wagner* (1852, Ch.) 1 DeG. M. & G. 604, to a discharge by an employer, and probably it is not applicable in any event to a contract for legal services. See Pomeroy, *Equity Jurisprudence* (4th ed. 1919) secs. 1712, 1713.

[15] See on this point Estrich, *op. cit.* note 6.

[16] "Indeed, the right of a client so to discharge his attorney is practically indispensable in view of the delicate and confidential relations which exist between attorney and client, and of evil to the client's interests, engendered by friction or distrust." Thornton, *op. cit.*, sec. 138, with cases collected. See also 6 C. J. 676; cases in note 18 *infra*. So also, as the client must have full control of his case, an agreement that a suit should not be settled without the attorney's consent is void as against public policy. *Matter of Snyder* (1907) 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, note, 13 Ann. Cas. 441, note. See also Ann. Cas. 1913 D 306, note; 3 A. L. R. 472; *Moran v. Simpson* (1919, N. D.) 173 N. W. 769; *Simon v. Chicago etc. Ry.* (1920, N. D.) 177 N. W. 107, overruling *Greenleaf v. Minneapolis etc. Ry.* (1915) 30 N. D. 112, 151 N. W. 879. The same policy is expressed by the cases holding that a testator cannot force his executors to employ a particular attorney in settling his estate. *Foster v. Elsley* (1881) 19 Ch. D. 518; (1915) 28 HARV. L. REV. 530.

[17] See note 5 *supra*.

tion universally so carefully cherished by the courts, if the client is no better off than any party to a contract of personal service who desires to terminate it. If a client must show legal cause in each case before discharging his attorney or else pay the attorney whatever high fee may have been agreed upon as the price of success, then it is obvious that the relationship will continue after the client has ceased to have absolute confidence in "either the integrity or the judgment or the "capacity of the attorney."[18] The New York rule is absolutely correct in treating the "right to discharge" as a barren power if the contract fee is nevertheless to be paid. If the New York rule is to be followed, in all honesty the courts should cease their talk about the nature of the relationship and its requirement of absolute confidence, since they are according nothing more than is inherent in any similar contract for services.

It is submitted further that independent rules of policy justify the New York rule. Under the English law a barrister may not recover a fee by suit.[19] Only a solicitor may so sue.[20] It is then the ideal of the legal system from which our law springs that the counselor-at-law is not a hireling of the market, but is an officer of the court whose duty it is to see that justice is done and who receives from those whom he has protected such honorarium as their gratitude dictates.[21] Such an ideal may easily degenerate into a cloak for hypocrisy,[22] and yet, as many of our greatest lawyers have pointed out, there is something fine in holding as an ideal of the profession the ministry of justice rather than the making of money.[23] In spite of sneers and jibes, we know that the best lawyers in the country to-day faithfully serve such an ideal. We may go further and say that none but the poorest grade of lawyer will sue for a fee except in case of great imposition.[24] The ordinary dispute as to fees is settled without court action.

[18] Cf. *Gage v. Atwater* (1902) 136 Calif. 170, 172, 68 Pac. 581; *Henry v. Vance, supra* note 6; *Matter of Dunn* (1912) 205 N. Y. 398, 98 N. E. 914.

[19] *Kennedy v. Broun* (1863, C. P.) 13 C. B. (N. S.) 677.

[20] *Poucher v. Norman* (1825, K. B.) 3 B. & C. 744.

[21] The reasons of policy stated in *Kennedy v. Broun, supra,* have not met, however, with complete approval. See *Reg. v. Doutre* (1884, H. L.) L. R. 9 A. C. 745, 751; *McDougall v. Campbell* (1877) 41 U. C. Q. B. 332, 346, (Harrison, C. J. dissenting); *Christen v. Lacoste* (1893) 2 Que. Q. B. 142, 147, pointing out the similarity of the Roman, French, and English systems; 6 C. J. 718; Thornton, *op. cit.,* sec. 400 ff. But see Cohen, *The Law—Business or Profession?* (1919) 201 ff.

[22] Cf. cases in note 21, *supra.*

[23] On the English system of fees see quotations from Joseph H. Choate and others collected in Costigan, *op. cit.* note 1, at p. 481 ff; Smith, *Justice and the Poor* (1919) 85, 86.

[24] See A. B. A. Canon 14: "Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients concerning fees should be resorted to only to prevent injustice, imposition or fraud."

We may well look askance at a rule of law which will ordinarily be resorted to only by the more offensive members of the bar.

A contract for an agreed fee by its very nature tends towards unfairness. Lawyers' fees are difficult enough to compute when all the items, such as time involved, amount involved, and the result of the litigation, are known. When substantially all factors of this kind are undetermined, naturally the lawyer—the one party to the relation who by his profession is familiar with the business in hand—will state a fee sufficiently high to cover all contingencies. In *Ritz v. Carpenter* (1920, S. D.) 178 N. W. 877, plaintiff had been employed to defend one accused of crime, and, according to his claim, after appearing at the preliminary hearing for $250, agreed to appear at the trial for $7,500.[25] Moreover the fact that here the factors upon which fees are ascertained are so uncertain will tend to foster contingent fee contracts, the extortion and oppression of which have often been discussed.[26] In many of the cases adopting the New York rule, the same result could have been reached by applying the provision of the Canons of Ethics that the court should supervise contingent fees.[27] The provision has not been as successful as might have been hoped,[28] and hence it is wise that the courts have directly and conclusively taken control of this particular problem.

The rule allowing only *quantum meruit* does not operate unfairly to the attorney in actual practice, as anyone who has attempted to contest attorneys' fees can testify. The attorney has all the advantages in securing evidence to prove his case in any claim for the reasonable value of his services, and the court or jury can be relied on to take care of manifest unfairness upon the part of the client. If, as stated in *Ritz v. Carpenter,* the jury may consider the agreed fee in determining what would be such reasonable value, the lawyer is fully protected.

The New York rule has been stated not to apply to cases where the attorney "has changed his position or incurred expense" or "is "employed under a general retaining fee for a fixed period to perform "legal services." It is submitted that the first exception is useless and should be forgotten. An attorney has always changed his position by merely accepting the employment, since he cannot thereafter be employed on the opposite side. The second exception, a contract for a fixed period, seems to be generally approved[29] and has recently been followed by the New York Court of Appeals in *Greenburg v. Remick*

[25] He explained his high charge for the trial on the ground of the ignominy his appearing in defense of such a crime might bring on himself. But he had already appeared at the preliminary hearing for the smaller sum.

[26] See citations in (1920) 30 YALE LAW JOURNAL, 82.

[27] Note 2, *supra.*

[28] Cohen, *op. cit.* note 21, at p. 207. See also note 2, supra.

[29] *Horn v. Western Land Assn.* (1875) 22 Minn. 233; *Dixon v. Volunteer Bank, supra* note 12; cases collected L. R. A. 1917 E. 406, note.

& Co. (1920, N. Y.) 129 N. E. 211, reversing the judgment of the appellate division[30] which had sustained a demurrer to an attorney's complaint for breach of contract for yearly employment.[31] Logically the case is similar to that of employment for a particular case, but practically the reasons of policy are not so strong. Both parties are able in advance to make a fairer estimate of the value of the services for the fixed period than is possible where the amount of services to be rendered is wholly indefinite, and one who has sufficient law business to employ an attorney regularly is probably sufficiently informed as to its character to avoid imposition. It would not have been undesirable for the court to assume control of this class of fees, though in view of the difference in situation, probably it cannot reasonably be criticised for failure to do so.

It is obvious that one's answer to the questions here involved will turn upon the background of his own experience and the point of view with which he approaches the problem. If his experience has been (as it is suggested is the more general experience) that comparatively few clients are able to impose upon lawyers, while unfortunately the converse is not true, his views will accord with those expressed in *Martin v. Camp*. And they will be more strongly fortified if his point of view is not that of the lawyer trying to make a living, but is that of one seeking the general welfare of the community, which needs urgently men of exceptional character as its "officers of the court." It is unfortunate that such welfare may not coincide with the needs of the young man with his way to make. Perhaps to some the answer may seem harsh, but it is nevertheless sound that unless he wishes to accommodate himself to the high standards of the profession necessary to the general welfare, he should employ his time and talents in other fields.[32]

C. E. C.

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[30] (1920) 191 App. Div. 947, 182 N. Y. Supp. 229.

[31] The court repeats the unfortunate statement in *Martin v. Camp, supra* note 6, that "the right to discharge" the attorney is an implied condition of the contract, and then adds, "unless expressly or otherwise negatived." This last is against all authority, particularly in New York. See notes 16 and 18, *supra*. The implication is one of law, not of fact. This shows the danger of failing to recognize that an implication or presumption of law means simply that whatever is to be so implied or presumed—here the fact of an agreement—is no longer a necessary operative fact in the legal situation under consideration. Cf. (1920) 29 YALE LAW JOURNAL, 921.

[32] Cf. Cohen, *op. cit.* note 21, at p. 214.